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NO. 74-1639

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

MORTGAGE SERVICES, INC., A
West Virginia Corporation,

Petitioner, Plaintiff below,

Vs.

RALPH I. YARNELL,

Defendant below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

Your petitioner, MORTGAGE SERVICES, INC., a West Virginia corporation, respectfully prays that a Writ of Certiorari be issued out of and under the Seal of this Court to review the decision of The United States Court of Appeals for the Fourth Circuit, rendered on March 26, 1975.

OPINION BELOW

The opinion of the Court of Appeals has not been reported. A copy is appended as Appendix I.

JURISDICTION

The jurisdiction of this Court is invoked under the provisions of 28 USCA §1254 (1).

QUESTIONS PRESENTED

The questions presented by this petition are:

(1) Is it not the duty of the Court to apply and not interpret a contract which is clear and unambiguous?

(2) Should not the trial court grant Summary Judgment where the depositions and other pleadings show that there is no genuine issue of fact and the only issue is the meaning of the clear and unambiguous language of the contract?

(3) Where a contract is clear and unambiguous and the parties admit everything necessary to an award of a judgment to the plaintiff as a matter of law, are not the plaintiff's constitutional rights under the Fifth Amendment violated by submitting the case to the jury for its decision which thereby gives the jury the right to make a new contract for the parties in spite of the clear and unambiguous language of the contract of the parties?

STATUTE INVOLVED

Fifth Amendment to U.S. Constitution and universally accepted rule of law as to interpretation of contracts.

STATEMENT

The basis for Federal Jurisdiction in the Court of the first instance is diversity of citizenship, the petitioner,

plaintiff below, being a West Virginia corporation, and the defendant below being a resident of the State of Ohio.

Plaintiff's Assignor, who was a real estate broker and developer, and defendant entered into a written agreement as follows:

"Ref: Proposed construction of 86 bed nursing center, located on the same land as the Anchorage Nursing Home, Harmar Street, Marietta Ohio

"Dear Mrs. May:

"You are hereby authorized and employed by me to do all things necessary in relation to compiling detail information to submit to lenders for the purpose of obtaining financing to construct the above mentioned Nursing Home. You may have my permission to act as my agent. All detail information will be signed by me or approved by me before submitting to any outside source. All information to be held by you.

"For your services, I will pay you a service fee of 10% of actual construction costs on the structure only. This fee to be paid from money obtained for the construction of the above mentioned Nursing Home, in monthly payments, starting with the first construction draw and continuing. Total amount to be paid in full upon completion of construction.

"Very truly yours,

"Mr. & Mrs. Ralph I. Yarnell,
owners

"/s/ Ralph I. Yarnell"

By defendant's own admission plaintiff's assignor did in fact compile the information necessary to submit to lenders. However, since payment for her services was to be made from construction loan proceeds, plaintiff's assignor not only compiled the information to submit to lenders but in addition thereto, did for over one year actually prepare and submit the necessary documents to lenders, all of which was done with defendant's consent. Defendant, having learned from plaintiff's assignor exactly what information and documents were required by prospective lenders, submitted with plaintiff's assignor's help and cooperation the same to Galbreath Mortgage Company which approved and granted the defendant a construction loan. Plaintiff's assignor assigned her claim to the plaintiff who demanded payment in the amount of $41,063.30 which sum represented ten per cent of the actual construction costs, as agreed upon. Defendant refused to pay, claiming that the plaintiff's assignor did not actually obtain the loan. Plaintiff filed its action in The United States District Court for the Northern District of West Virginia and after the defendant's Answer was filed, his deposition was taken. Plaintiff moved the Court for a Summary Judgment on the grounds that the contract between the parties was clear and

unambiguous and that plaintiff's assignor was required only to compile the information to submit to lenders and was not required actually to obtain the loan on defendant's behalf or to find a lender as was defendant's contention. The District Court refused to grant plaintiff's motion for summary judgment and the matter was tried before a jury. The jury decided in favor of the defendant. Plaintiff moved for judgment notwithstanding the verdict or in the alternative a new trial, and upon the District Court denying said motion, plaintiff appealed to the Court of Appeals for the Fourth Circuit which affirmed the action of the District Court.

SPECIFICATIONS OF ERRORS TO BE URGED

The Circuit Court of Appeals erred as follows:

(1) In not requiring the District Court to grant plaintiff's motion for summary judgment when there was not genuine issue of fact in accordance with Rule 56 of The Federal Rules of Civil Procedure.

(2) In not requiring the District Court to grant plaintiff's motion for a directed verdict and for judgment as a matter of law after all the evidence was in since there was no genuine issue of fact to be determined.

REASONS RELIED ON FOR GRANTING THE WRIT

(1) The decision below is in conflict with the Fifth Amendment to

the United States Constitution and decisions of The Fourth Circuit and all other Circuits and of the decisions of The Supreme Court of Appeals of West Virginia.

It is the duty of the Court to decide questions of law and it is the duty of the jury to decide questions of fact. There is no rule more basic in the American system of jurisprudence.

This Court and the Courts of Appeal in virtually every Circuit have held that the true meaning of a contract, the terms of which are clear and unambiguous, is a matter of law which must be decided by the Court.

As stated in Barron and Holtzoff (Sec. 1231), the purpose of the summary judgment procedure is to enable a party to pierce the allegations of fact in the pleadings and obtain relief by showing that there are no issues of fact to be tried. Its purpose is also to separate the formal from substantial issues, eliminate improper issues, determine what, if any issues of fact are present for the jury to determine, and enable the Court to give judgment on the issues of law where no disputed issues of fact are found.

The wisdom in having such procedure was demonstrated in the case. The jury was forced to decide on factual issues not pertinent to the real issue, i.e., what did the parties to the contract agree to do. In doing so the jury was no doubt influenced by the fact that

the defendant was a minister. The defendant's testimony was interspersed with references to praying for the plaintiff's assignor and thinking she was not a Christian woman. In short, the defendant took full advantage of testifying to factual matters which influenced the thinking of the jury which would have had no part in the legal processes had the District Court complied with Rule 56.

In order to be consistent with the law of the State of West Virginia and with the previous decisions of virtually each of the Circuits in the United States, the Writ of Certiorari prayed for should be granted.

It is respectfully submitted that there is here presented a proper occasion for the exercise of the supervisory power of this Honorable Court.

MORTGAGE SERVICES, INC., a West Virginia Corporation, Petitioner

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 74-1884

MORTGAGE SERVICES, INC.,
a West Virginia corporation,

Appellant,

Vs.

RALPH I. YARNELL,

Appellee.

Appeal from the United States District Court for the Northern District of West Virginia, at Elkins. Kenneth K. Hall, District Judge.

Argued: March 6, 1975. Decided: March 26, 1975.

Before BRYAN and BUTZNER, Circuit Judges, and CLARKE, District Judge.

William L. Jacobs (Louie S. Davitian on brief) for appellant; Randall Metcalf (Arthur N. Gustke on brief) for Appellee.

Per Curiam:

The appellant sought recovery from Appellee for alleged breach of contract for services. Appellee asserted several defenses including failure of Appellant to perform and fraudulent misrepresentation by Appellant.

The jury verdict on conflicting evidence was in favor of Appellee and the judgment entered on the verdict is the basis of this appeal.

Upon consideration of the brief, record and oral argument, we find no error and accordingly, the judgment of the lower court is affirmed.

APPENDIX B

PORTIONS OF THE RECORD

To illustrate that this case involves a pure question of law and the impairment of a contract by the submission of the case to the jury thereby permitting the jury to make a new contract for the parties we may accept as true everything testified to by the defendant Yarnell, which embodies all of the elements necessary for recovery in this case as a matter of law by the petitioner, the plaintiff below.

With reference to the contract entered into by the parties dated March 17, 1966, did the defendant Yarnell know that the contract provided "for your services I will pay you a service fee of ten per cent of actual construction costs of the structure only?" His answer was "indeed I was aware of everything the document said." (appendix, page 511) And if anything further is needed to eliminate any doubt on this point, the Court's attention is respectfully directed to the testimony of defendant Yarnell in the appendix at pages 635 and 636, as follows:

"Q Directing your attention now to page 14 of your discovery deposition. Were you asked this question and did you give this answer?

"'Q Does not this document say --'"

"THE WITNESS: excuse me, where are you reading from?"

"Q Page 14 near the top, about the fourth line, Mr. Yarnell.

"'Q Does not this document say, for your services I will pay you a service fee of ten percent of actual construction cost of structure only? Isn't that exactly what this says?'

"A That is exactly what that says.'"

"Were you asked that question and did you give that answer?"

"A Yes, Sir."

"Q And you knew that was in the document at the time you signed it, didn't you sir?"

"A Yes, I knew it."

If the defendant Yarnell in fact had been informed that there was a written loan commitment in the mail did he not expressly waive lack of any binding commitment at the time he signed the contract and shortly thereafter? Here is his language taken from the appendix at pages 629 and 630:

"Q As I understand your testimony sir, you say that within about three weeks of the date of this contract in March -- March 17, 1966,

it became -- you became aware of the fact that she did not have any binding commitment for a loan, is that right, sir?

"A I believe my testimony was a maximum of three weeks, perhaps less than that.

"Q Not more than three weeks from March 17, 1966, right, sir?

"A This is in reference to the insurance company that she said, that she had a verbal commitment from and on the date of the contract signing, she said that the written commitment was in the mail.

"Q Well, as soon as that less than three weeks was up, did you at that time advise her that the deal was off, that she was no longer to seek a financial institution for you?

"A I did not.

"Q And you did not until at least in December of 1966, right, sir?

"A That is correct."

And if there were any doubt about the defendant Yarnell's waiver of any claimed misrepresentation with respect to a loan commitment at the time of the signing of the contract, his own words clearly show that he waived any such claim of fraud as reflected in the transcript of his testimony beginning at the bottom of page 533 in the

appendix and reading as follows:

"Q Directing your attention to the top of page 12. I am going to ask you if you did or did not make this statement.

"' Mrs. May (assignor of plaintiff below) informed me that this quite evidently would only be a one company affair with the things that she was going to assemble, but she said there was always the chance that something would go wrong and if her insurance company did not come through with her verbal commitment, she wanted to prepare information for additional lenders.'

"Then you were asked this question.

"'Q That was agreeable with you, was it not?

"'A That was agreeable with me. Yes.'"

"Now, did you make that statement and give that answer?

"A I did, Sir."

For how long after the signing of the contract was the defendant Yarnell aware of the fact that Mrs. May was acting in his behalf in attempting to obtain a loan? Here are his words, as taken from pages 624 and 625 of the appendix:

"Q Now, directing your attention to page 8, slightly below the middle of the page. Were you asked these

questions and did you give these answers?

"'Q Now Mr. Yarnell, you were personally aware of the fact that after you signed this document that you just identified, on or about March 17, 1966, that Mrs. May did undertake to assist you to obtain a loan for the construction of a nursing home that you contemplated building; you were aware of that, weren't you?

"'A I thought so at the time.

"'Q And you thought so for at least a year following that date, did you not?

"'A For sometime after that. Yes.

"'Q For how long after?

"'A I cannot actually say.

"'Q Can you give us the approximate number of months that you thought so?

"'A That is almost an impossibility to answer because I became skeptical after that, that she had any connection whereby she could obtain this loan.

"'Q For how long did you have knowledge that she was attempting to secure this money for you for the construction of the nursing home?

"'A By her contacts with me, mostly by telephone calls and a few

letters, she claimed to have been making additional contacts and inquiries for perhaps a year.

"'Q And is that your best estimate of the time involved?

"'A Yes, sir.'"

"Were you asked those questions and did you give those answers?"

"A Yes, sir."

Did the defendant Yarnell agree with the procedures employed by Mrs. May? His words in this regard were as follows, as taken from the transcript of his testimony on page 634 of the appendix:

"You asked on the previous page if you could qualify your answer. Did you at that time sir, say: 'Mrs. May informed me that this quite evidently would only be a one company affair with the things that she was going to assemble. But she said, that there was always the chance something could go wrong and if her insurance company did not come through with their verbal commitment, she wanted to prepare information for additional lenders.'"

"Q That was agreeable with you, was it not?"

"A That was agreeable with me. Yes."

"Is that a fact?"

"A This is a fact that I said that. Yes, sir."

"Q And this was what she told you at the time of the execution of the agreement, is that right, sir?"

"A Essentially, the content. I am not saying it is word for word."

"Q But that is substantially what she told you at that time?"

"A Yes, sir."

Was the defendant Yarnell aware of the fact that Mrs. May was attempting to obtain a loan for him? His testimony provides the answer as follows (appendix pages 530-531) as follows:

"Q You were of the belief, were you not Mr. Yarnell, that Mrs. May was attempting to obtain a loan for you for perhaps a year, is that right, sir?

"A I was aware that she was calling me and saying that she had companies interested."

"Q That was over a period of a year, is that right, sir?"

"A Approximately. Yes, Sir."

"Q Now, at the time that you signed the agreement on March 17, 1966, did you intend to pay Mrs. Leta Leachman May in accordance with the contract?"

"A The contract was misleading. I intended to pay her according to the agreement which she and I had."

Did the defendant Yarnell accept the benefits of Mrs. May's work and when for the first time does he claim that there was any recission (much less a mutual rescission as required by law)? He answers this as follows (as shown in the transcript of his testimony on pages 515 and 516 of the appendix):

"Q Now sir, after you signed this document of March 17, 1966, over what period of time did you continue to talk with Mrs. May, either fact to face or telephone, with respect to obtaining a loan to construct the additional facilities at the Christian Anchorage Nursing and Rest Center?"

"A Over a period of about three weeks at the most when I knew that I was in a spider's web, and that there was no money coming forth as she promised. Then the conversations continued through about December of that same year."

"Q The three weeks that you have reference to are the three weeks immediately following March 17, 1966, is that right, sir?"

"A That would be the maximum three weeks, yes, following March 17th."

"Q And that was the date on which you said that you became aware that the loan that you previously

mentioned had not come through -- was not going to come through, is that right, sir?"

"A That is right. It was supposed to have been in the mail the day I signed the agreement.

"Q Then sir, how frequently or how often after that, did you meet or talk with Mrs. May in a continuation of the efforts to obtain a loan?

"A Very seldom did I contact her. She contacted me many times by phone.

"Q Approximately how many times?

"A I could not say, sir.

"Q The fact is, is it not sir, that during that year beginning on and after March 17, 1966, you were in frequent contacts with Mrs May, isn't that true, Sir?

"A She was in frequent contact with me would be more true.

"Q Was that as often as once or twice a week or more frequently, sir?

"A It would be much less frequently than once or twice a week.

"Q And that continued up to when, sir? The date of it -- the approximate date of it.

"A Until in December, when I told her to cease any activity on my behalf whatsoever."